

**United States Department of Labor  
Board of Alien Labor Certification Appeals  
Washington, D.C. 20001**

**'Notice: This is an electronic bench opinion which has not been verified as official'**

Date: September 26, 1997

Case No. **95 INA 674**

In the Matter of:

**JOAN CROWE,**  
**Employer**

on behalf of

**KRISTYNA SYNORADZKA,**  
**Alien**

Appearance: P. W. Janaszek of New York, New York, Agent

Before : Holmes, Huddleston, and Neusner  
Administrative Law Judges

FREDERICK D. NEUSNER  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from a labor certification application that was filed on behalf of Krystyna Synoradzka (Alien) by Joan Crowe, (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.<sup>1</sup>

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the

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<sup>1</sup>The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.<sup>2</sup>

### STATEMENT OF THE CASE

This case involves an application (ETA 750A) for permanent full time employment of the Alien as a Kosher Household Cook<sup>3</sup> with the following duties:

Prepare, season, and cook soups, meats, vegetables according to Kosher dietary requirements. Bake, broil, and steam meat, fish and other food. Prepare Kosher meats, such as Kreplach, Stuffed Cabbage, Matzo Balls. Decorate dishes according to the nature of the celebration. Purchase foodstuff and account for the expenses involved.

In the form ETA 750A the Employer said the Alien was to work a basic 40 hour week with no overtime anticipated.<sup>4</sup> The hours were to be from 8:00 a.m. to 5:00 p.m., at the rate of \$12.81 per

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<sup>2</sup>Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

<sup>3</sup>Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor. DOT No. **305.281-010 Cook (Domestic ser.)** Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peals, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist(domestic ser.).

<sup>4</sup>The Alien stated in ETA 750B that she was currently in the United States on a B-2 Visa, had worked as a Kosher Cook for a family in the United States for a period of 3 years.

hour.<sup>5</sup> Accompanying the ETA 750A was the following statement from the Employer:

Please be advised that I have an opening for a position of Cook Kosher Live-Out in my household. My husband and I are employed full time as actors. I have a three year old son. My child require[s] proper and nutritious meals served on a regular basis. I am not in a position to prepare meals because of my demanding work schedule. The employment of Cook, live out is necessary for me in order to provide my child with proper nutritious meals. At the present time we do not employ any U.S. workers in the home. At the present time all cooking duties are performed by a family member who no longer can do this because of personal reasons. All other household chores are performed by part time help who comes to our house when needed. Currently child care duties are performed by a family member. Due to religious considerations meals in my house must be prepared in accordance with the principles of Kosher Cuisine.

**Notice of Findings.** Following the receipt of the case from the State job agency, the CO issued a Notice of Findings in which she proposed to deny the application on the basis that it did not appear that the duties described in the ETA 750A constituted the full-time work required by §656.50 of the regulations. The CO advised the Employer that she could rebut this finding by amending the job duties or by submitting evidence that the job constitutes full-time employment and has been customarily required by the Employer. The CO specified that such evidence should include the following:

State the number of meals prepared daily and weekly; the length of time required to prepare each meal; identify the individuals for whom the worker is preparing each meal on a daily and weekly basis; provide a representative one week schedule accounting for eight hours per day/40 hours per week.

If you are claiming you need to employ a cook on a full-time basis because you entertain frequently, you must describe in detail the frequency of household entertaining during the preceding twelve (12) month period. List the dates of entertainment, the nature of the entertainment, guests, the number of meals served, the time and duration of the meal, etc.

Will the worker be required to perform duties other than

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<sup>5</sup>The Employer added the following statement to the ETA 750A: "work a basic 40 hour week without overtime being anticipated. The hours were noted to be from 9:00 a.m. to 6:00 p.m. with a rate of pay of \$12.81 per hour."

cooking, i.e., houseworker, child care, home attendant? If yes, list each duty and the frequency of performance.

Evidence employer has employed full-time cooks in the past, i.e., copies of tax and/or social security report forms. If it is your position that a "relative" has been performing these duties, you must supply evidence to support that this "relative" was performing cooking duties exclusively eight hours per day, five days/forty hours per week. Please indicate when this "relative" started performing these duties.

Who will perform the general household maintenance duties, such as cleaning, laundry, vacuuming, etc.? If it is your position that the cleaning duties are performed by an "hourly worker", you must supply evidence to support, i.e., bills and canceled checks for the last 12 months. Any other information and evidence that clearly establishes and demonstrates that this is a permanent, full-time job offer that employer customarily has required.

The CO also required the filing of evidence regarding the care to be provided for the Employer's child while the parents were absent from the home.

**Rebuttal.** The Employer explained in her rebuttal the work schedules she and her husband followed:

My husband and I are under contract for production. We shoot scenes, or record skids only several times per month. Each assignment is preceded by the contract and set negotiations, rehearsals etc., a lot of this work is done from home. There is no static schedule that I can offer. If the set calls for a night scene, then, off-course (sic) it can only be shot after dusk. My husband and I work independently, and one of us is always available to watch Robby. Recently [her husband] has been doing a lot of voice-overs, this he does from home.

The Employer maintained further that the nature of their business requires that they entertain an average of ten guests every Tuesday and Thursday, and they also entertain family members each Saturday and on holidays, birthdays and anniversaries.

The Employer set forth in her rebuttal the following "Representative Schedule" for the cook:

The cook reports for work at 9:00 a.m. and will perform the following tasks during the course of the day:

a.) the cook will prepare a balanced menu; one that will reflect our nutritional concerns. Most meals will be

prepared according to strict dietary guidelines. Foods will be low in fats/cholesterol/sodium, while being rich in fiber, calcium, and minerals as iron, potassium, magnesium, zinc, selenium, chromium etc. The cook will also prepare schmaltz.

b.) the cook will shop for all necessary foodstuffs: dairies, meats, fruits, vegetables etc. All items required for all meals will need to be purchased daily, to ensure freshness.

c.) purchased items will be put away/refrigerated, while others will need to be prepared for later use in advance, i.e., marinades, very popular in Jewish cuisine, will be started on immediately upon home from shopping.

d.) the cook will take one hour off for rest and a meal at noon.

e.) the cook will prepare lunch for all members of the household.

f.) the cook will prepare afternoon snacks for children and adults.

g.) the cook will prepare evening snacks for all members of the household. These meals will have to be low in calories considering the time of day they are consumed.

h.) the cook will prepare complete dinner for all members of this household. The dinner will include an appetizer, a salad, a soup, the main course, a dessert and a beverage.

i.) the cook will account for expenses incurred daily.

j.) The cook is free to leave at 6:00 p.m.

The Employer added that meals required on Tuesday, Thursday, and the weekend will be prepared by the cook a day or two in advance and stored for reheating and serving. She said further that a relative had been cooking for her child, and that she and her husband ate at restaurants or ordered food. She said that she and her husband performed all household maintenance duties.<sup>6</sup>

**Final Determination.** The CO's Final Determination denied the application for alien labor certification because the Employer failed to meet the requirements of 20 CFR, Part 656. The CO said it did not appear that the activities described the rebuttal would require or consume eight hours per day, five days per week, and that she failed to provide the requested information as to the extensive entertainment history she claimed, other than a series of chronological dates.

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<sup>6</sup>The rebuttal also included a statement from Ann Crowe, the Employer's sister, who reported that she cooked and cared for the Employer's son for several years because of the Employer's busy schedule and bad back. She added that she could no longer do this work, as she had relocated to California. The Employer also submitted several receipts evidencing meals that were consumed at or ordered from various restaurants from December 1992 to May 1995. The Employer then attached copies of recipes excerpted from The Jewish - American Kitchen, which included a recipe for shmaltz.

First, the CO noted that the Employer said she needs to employ a cook on a full-time basis because she entertains frequently, the CO directed her to describe in detail the frequency of household entertaining during the preceding twelve (12) month period, listing the dates of entertainment, the nature of the entertainment, the names of the guests, the number of meals served, the time and duration of the meal, and similar background information appropriate to verify this assertion.<sup>7</sup>

Second, the CO concluded that the Employer had failed to prove the listed duties would either require or consume an eight hour day for forty hours a week, regardless of the type of food the cook is preparing. Instead, the CO concluded, "It appears, rather, based on the employer's responses and failure to address certain issues, that the position of 'Cook' was created solely for the purpose of qualifying the Alien for a visa as a skilled worker, the only household occupation which falls into the skilled worker category." AF 95-96.

**Appeal.** The Employer has requested a review of the denial of her application and the record has been submitted to the Board for such purpose.

## DISCUSSION

The primary issue on which the CO appears to have decided this application did not include whether or not the Employer's responses to the NOF establish the business necessity of this position, as the CO focused entirely on whether or not a full time position was proven. Consequently, the issue here is whether the CO's conclusion that full time employment is being offered is a reasonable inference from the evidence of record. We think it is not. The Employer's application for alien employment certification definitively indicated the conditions of employment. 28 U.S.C. § 1746; and see 20 CFR § 656.20(c)(9). The conditions of employment state that forty hours of work are being offered each week at an hourly rate of \$12.48, the adequacy of which is unchallenged by the CO.

There is no evidence to the contrary in the Appellate File, and the CO refused to accept Employer's estimate of the time the cook would take to perform the proposed job duties because it is the CO's opinion that time the Employer assumed the work would require was unrealistic and contradictory. The CO concluded that even if the Employer's version of the amount of the time that would be required for each function was accepted, the total would

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<sup>7</sup>The CO also cited a contradiction between Employer's representation that an hourly worker should perform household cleaning duties and her rebuttal representation that she and her husband would continued doing this work, themselves.

not be equal to an eight hour day. It follows that this dispute comes down to Employer's asserting that preparation of a particular meal takes a certain amount of time, while the CO disagrees and says that it will take less time to prepare the meal in question. In the absence of supporting evidence the CO's finding that the duties described would not constitute forty hours of work is speculative at best. Consequently, we conclude that the evidence of record does not support the CO's finding that the Employer offered full time employment.

On the other hand, the NOF did raise an unresolved issue as to whether or not the position description requirement of two years of specialized cooking experience in the duties of a Kosher cook is unduly restrictive. The effect of this job requirement is to eliminate a U. S. applicant who has two years of cooking experience within the meaning of the DOT position description, but no experience in Kosher cooking. As the CO appears to have confused Employer's proof that this position offers full time employment for a forty hour week with the issue of the business necessity of a restrictive job requirement, the Final Determination cannot be construed as having determined this issue after weighing the evidence in the record as a whole. For this reason, this matter will be remanded to the CO with directions to consider whether Employer's requirement of two years in cooking Kosher foods is unduly restrictive for the reasons discussed above. 20 CFR § 656.21(b)(2)(i)(B). If the CO finds the requirement is unduly restrictive, then the Employer will be required to prove that the hiring of a Cook (Household)(Live-Out), specializing in Kosher cooking under DOT No. 305.281-010 arises from business necessity.

As the CO did not consider whether Employer's requirement of experience in cooking Kosher food is unduly restrictive under 20 CFR § 656.21(b)(2)(i)(B), the following order will enter.

### **ORDER**

The Certifying Officer's decision denying certification under the Act and regulations is hereby set aside and this file is remanded for reconsideration for the reasons hereinabove set forth.

For the Panel:

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FREDERICK D. NEUSNER  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.



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## BALCA VOTE SHEET

Case No. 95 INA 674

JOAN CROWE, Employer  
KRYSTYNA SYNORADZKA, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

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	:	CONCUR	:	DISSENT
	:	:	:	COMMENT
	:	:	:	:
Holmes	:	:	:	:
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Huddleston	:	:	:	:
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This has been redrafted to meet your comments and is again submitted for the panel's consideration. Please append your dissent or concurrence to the BALCA Vote Sheet and return to me.

Thank you,

Judge Neusner

Date: September 8, 1997